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No. 65, Original

Supreme Court, U.S.
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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1986**

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW MEXICO,

Defendant.

**Exception of the State of Texas
to Report of the Special Master and Brief in Support**

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**EXCEPTION TO THE REPORT OF
THE SPECIAL MASTER**

The Court ordered the July 31, 1986, Report of the Special Master filed on October 6, 1986. In this exception and the supporting brief, the report will be referred to as the 1986 Report.

Texas accepts the 1986 Report, except for one matter. Texas objects to the determination that, for the years 1962 through 1983, departures from New Mexico's delivery obligations to Texas under the Pecos River Compact caused by the existence of a training dike in the McMillan Reservoir ("McMillan dike") will not be characterized as depletions due to man's activities.

Respectfully submitted,

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BRIEF IN SUPPORT OF TEXAS' EXCEPTION

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1).

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), governs this case. Appendix A to the brief sets forth the Compact.

STATEMENT OF THE CASE

1986 Report

Three times in the past, the Court has received and ruled on reports from a Special Master in this case: in 446 U.S. 540 (1980), the Court ruled on the 1979 Report; in 462 U.S. 554 (1983), it ruled on the 1982 Report; and in 467 U.S. 1238 (1984), it ruled on the 1984 Report. Now, through its ruling on the 1986 Report, the Court will conclude the final phase of the litigation.

The Court's opinion in *Texas v. New Mexico*, 462 U.S. 554 (1983) ("1983 Pecos decision"), discusses the historical background to the litigation, *id.*, at 556-62, and it need not be repeated here. For present purposes, only a brief outline is needed of the litigation mileposts which have led to the presentation of the issues now before the Court.

Texas initiated the litigation in June, 1974, when it filed its complaint that New Mexico was violating its delivery obligations under the Pecos River Compact ("Compact"). New Mexico's delivery obligation is established by Article III(a) of the Compact:

New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

The Texas complaint was, and continues to be, that since 1950 New Mexico has not delivered Pecos River water to Texas at the New Mexico-Texas state line in accordance with its Article III(a) obligations.

In the final part of its 1983 Pecos decision, the Court marked the course for the rest of the litigation:

The crucial question that remains to be decided is ...: "[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Compact?" ... That question necessarily involves two subsidiary questions. First, under the proper definition of the "1947 condition," ... what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received? ... Second, to what extent were the shortfalls due to "man's activities in New Mexico"?

462 U.S. at 574-75. In addition to recommending remedies to insure future Compact compliance, the 1986 Report answers the Court's questions and explains the factual and legal bases for them. See 1986 Report 31 (table summarizing

answers).¹ Its conclusion is that, for the 1950-1983 period, New Mexico failed to deliver to Texas 340,100 acre-feet of water which Article III(a) of the Compact obligated it to deliver.

Texas takes exception to only one part of the Special Master's answer: the Special Master's conclusion that departures from New Mexico's Article III(a) obligations during the 1962-1983 period caused by the McMillan dike cannot be characterized as depletions due to man's activities. 1986 Report 18. If the Court sustains Texas' exception, then 27,600 acre-feet of water must be added to New Mexico's Article III(a) shortfall for the 1950-1983 period, resulting in its owing Texas 367,700 acre-feet of water for the period.

Proposed Decree

Before turning to legal argument on its exception to the 1986 Report, Texas needs to focus the Court's attention on one other matter pertinent to the case. The specificity and consequent enforceability of the final decree in this case are critical to Texas. Attached to the 1986 Report as Appendix A is a Proposed Decree prepared by the Special Master. As Texas understands it, the 1986 Report, not the Proposed Decree, is the reference point for any exceptions, and Texas has only one exception to the 1986 report. There are, however, three areas in which the 1986 Report is not fully reflected in the Proposed Decree. The three discrepancies appear to arise from inadvertence. They are discussed below.²

1. Prior to the 1986 Report, two elements leading to the answer to the first of the two subsidiary questions had been supplied. The proper definition of the 1947 condition was established by the Court's approval of the 1979 Report. 446 U.S. 540 (1980). The quantity of water Texas could have expected to receive under the 1947 condition each year of the 1950-1983 period was established by the Court's approval of the 1984 Report. 467 U.S. 1238 (1984). Column 5 of Table 2 on page 5 of stipulated Texas Exhibit 79 lists these quantities.

2. Attached to this brief as Appendix B is the Special Master's Proposed Decree, as it would be modified: (a) to correct for what Texas views as three inadvertent discrepancies between it and the 1986 Report; and (b) to reflect the sustaining of Texas' sole exception to the 1986 Report. The modifications are in bold-face type.

Discrepancy 1

In the last line of Section II(B), the phrase "and the other procedures" should be inserted before "contained in Tex. Exh. 79." The Section II(A) computation is a function of the calculation required in Section II(B). To complete the Section II(A) computation, more than just the "inflow-outflow and channel loss equations contained in Tex. Exh. 79" will be required, although they are the most significant factors in the computation. The "other procedures" used in Texas Exhibit 79, which was admitted into evidence by stipulation, also will be required.

The discussion in the text of the 1986 Report suggests that the omission was inadvertent. In the course of explaining how Texas Exhibit 79 had taken into account all natural depletions, thereby leaving only man-made depletions as the cause of New Mexico's delivery shortfall, the Special Master finds that "Dr. Murthy's testimony made it clear that the *procedures* followed in Tex. Exh. 79 accounted for all non-manmade depletions . . ." 1986 Report 9 (emphasis added). Later, in discussing remedies, the Special Master recommends that an injunction issue "to utilize Tex. Exh. 79 . . . as a basis for determining . . . New Mexico's Article III(a) obligation . . ." 1986 Report 46. No suggestion is made to limit the use to the inflow-outflow and channel loss equations. In fact, because the purpose is to provide a basis for determining the Article III(a) obligation and because all the Texas Exhibit 79 procedures must be used to complete that determination, the implication is that all the procedures should be used. It is for these reasons that Texas suggests the correction of this discrepancy.

Discrepancy 2

In the last line of Section IV of the Proposed Decree, "II(B)" should be changed to "II(C)". II(C), not II(B), sets forth the amount of past-due water New Mexico owes Texas.

Discrepancy 3

In Section IV, a second sentence should be added to establish, as the Special Master intended, that the water interest principle applies to each of the last five years of the pay back period,

as well as, in the aggregate, to the first five years of the pay back period. In his discussion of good faith and water interest, the Special Master defined good faith as

meeting at least 80% of the aggregate minimum delivery requirement for the first five years, *and the annual minimum delivery obligation each year thereafter.*

1986 Report 37 (emphasis added). See also *id.* n. 16 ("if New Mexico meets 80% of its obligation during the first five years *and each year thereafter*" (emphasis added)).

The Proposed Decree's Section IV, as it now reads, does not reflect the 1986 Report because it does not extend the water interest principle to each of the last five years of the pay back period. For example, if New Mexico were to escape the imposition of water interest during the first five years of the pay back period by meeting the 80% good faith standard, but then, on the sixth year, fail to pay back 80% of its Annual Minimum Delivery Obligation, the Proposed Decree would not impose water interest, even though the text of the 1986 Report demonstrates that the Special Master recommends that it be imposed in such a situation.

SUMMARY OF ARGUMENT

The construction of the McMillan dike in 1954 caused less water to seep from the McMillan Reservoir. Consequently, less Pecos River water reached Texas than would have if the dike had never been constructed. For the relevant 1962-1983 period, the McMillan dike prevented 27,600 acre-feet of water from reaching Texas that would have under the 1947 condition of the river, which was a condition that did not include the dike's existence.

Under Article III(a) of the Compact, these McMillan dike depletions are due to "man's activities" and, consequently, must be charged to New Mexico. This legal conclusion is unaltered by the fact that, in 1961 and 1962, the Pecos River Commission made findings of fact that did not charge McMillan dike depletions to New Mexico for the 1950-1961 period.

The 1961 and 1962 Commission findings did not purport to bind later Commissions to the same characterization of McMillan dike depletions when making findings for the years after 1961. Instead, the transcripts of the Commission meetings demonstrate that, despite an expressed displeasure with the characterization of the depletions, Texas acquiesced in it for the 1950-1961 period as an accommodation to New Mexico. That is, for now obscure reasons, Texas made a limited "deal" with New Mexico, notwithstanding the fact that the law did not require Texas to make it. New Mexico's efforts to convert the limited nature and duration of the accommodation into a permanent legal arrangement must fail.

Even if the Commission at the time had tried to permanently bind future Commissions' actions by an agreement so patently at odds with reality and the clear language of the Compact, it lacked the power to do so. That kind of action would constitute an amendment of the Compact. Under the Compact Clause of the Constitution, amendments can become effective only through ratification by the Texas and New Mexico legislatures and approval by Congress. None of these legislative steps has been taken since the initial Congressional approval of the Compact.

ARGUMENT

For the 1962-1983 Period, the 27,600 Acre-Feet of Departures from New Mexico's Article III(a) Delivery Obligations Caused by the McMillan Dike Are Depletions Due to Man's Activities and, Therefore, Are Chargeable Against New Mexico.

The McMillan Reservoir in New Mexico sits astride the Pecos River and impounds part of its flow. In 1954, the State of New Mexico, in cooperation with the United States Bureau of Reclamation and the New Mexico-based Carlsbad Irrigation District, built a dike along the reservoir's east side. Its purpose was to reduce seepage losses from the reservoir into a cavernous section located along the eastern shoreline. New Mexico State Engineer, *22nd Biennial Report*, at 53-54 (1956). The reduction in seepage losses caused by construction of the

McMillan dike resulted in less Pecos River water reaching Texas at the state line than would have reached it if the dike had not been built. For the 1962-1983 period, 27,600 acre-feet less water reached Texas as a result of the McMillan dike. 1986 Report 21-22.

Article III(a) of the Compact prohibits such depletions if they are due to "man's activities." Standing alone, the plain language of the Compact provides easy answers to any questions about the proper characterization and legal treatment of this 27,600 acre-feet of water. The McMillan dike was constructed by humans and, consequently, any depletions in the flow of the river at the state line are due to "man's activities." Because the McMillan dike did not exist until after 1947, the 1947 condition of the river—the benchmark of the Compact in general and Article III(a) in particular—cannot include the dike's existence and effects. Therefore, depletions due to the McMillan dike that are reflected at the state line mean that Texas is receiving less water due to man's activities than it would have under the 1947 condition. Because those depletions equal 27,600 acre-feet, New Mexico must be found to have fallen below its Article III(a) obligation by that amount.

The Compact makes the logic and its conclusion seemingly unassailable; yet, the Special Master rejects Texas' argument for the 1962-1983 period. 1986 Report 18. The rejection has two bases. First, he finds that the Court disposed of Texas' contention by holding in its 1983 Pecos decision that Commission actions on delivery obligations are dispositive. *Id.* Second, he finds that Pecos River Commission ("Commission") actions in 1961 and 1962 resolved the contention against Texas by placing a valid interpretive gloss on ambiguous Compact terms as they apply to the McMillan dike. *Id.* To understand the error in the Special Master's findings on this point, the Court must focus its attention on two crucial Commission meetings.

At its annual meetings in 1961 and 1962, the Commission, among other things, endeavored to determine the negative departures from New Mexico's Article III(a) delivery obligations for the 1950-1961 period. *See generally* Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b) at 231-48; and Minutes of the Commission, November 9, 1962, Stip. Exh. 4(b)

at 256-58. For the first and, thus far, the only time in its history, the Commission reached an agreement on departures. It determined the negative departures for the 1950-1961 period. 1986 Report 4-6 (negative departures equalled 53,300 acre-feet).

The McMillan dike was one of the dominant concerns of the Commission during the 1961 and 1962 deliberations, because the negative departures for the 1950-1961 period could not be finally determined until any controversies about the dike were settled. The fullest exposition of the McMillan dike issue is found not in the minutes of the Commission meetings (Stip. Exh. 4(b)), but in the transcripts of the meetings (Stip. Exh. 7).

At the 1961 Commission meeting, a Joint Memorandum signed by the Commissioners for Texas and New Mexico and by the Chair of the Engineering Advisory Committee to the Commission was made part of the Commission record. In a discussion covering several pages, most of which is omitted here, the memorandum made the following observations:

Another troublesome problem is how to deal with the leakage at Lake McMillan. . . . There was quite a sudden change after the unprecedented flood flows of 1941 and 1942. . . . The question is should the actual leakage that was taking place under 1947 conditions be used . . . in defining the 1947 conditions or should present conditions be used, or should the leakage that was occurring prior to the flood of 1941 and 1942 be used.

The Commissioners recognize that *morally* New Mexico should not be penalized for an unusual act of nature such as occurred in 1941.

Transcript of the Commission, January 31, 1961, Stip. Exh. 7 at 30-31 (emphasis added). The memorandum concluded the McMillan dike discussion with a recommendation which made negative departures due to the dike not chargeable to New Mexico. *Id.* at 32.

A short time later in the meeting, Mr. Tipton, the Chair of the Engineering Advisory Committee, discussed the McMillan dike issue again. *Id.* at 46. He restated the position of Mr.

Reese, the New Mexico Commissioner, that New Mexico should not be charged for McMillan dike depletions, then pointedly noted "[t]hat Mr. Vandertulip [the Engineer Advisor to the Texas Commissioner] by no means at the moment agrees with that interpretation." *Id.* at 46-47. The discussion of the McMillan dike issue ends obscurely with the passage of a motion encompassing several subjects, which, among other things, made findings of fact through the year 1959. *Id.* 52-53.

At its next meeting in 1962, in the midst of trying to determine the negative departures for the 1950-1961 period, the Commission once again took up the McMillan dike issue. Transcript of the Commission, November 9, 1962, Stip. Exh. 7 at 59-64. A document making tabulations for the relevant period was circulated, and the Engineer Advisor to the Texas Commissioner suggested deletion of part of it. *Id.* at 62. The Commission made the deletion, added a new sentence to the document, and adopted the document as findings of fact for the 1950-1961 period. *Id.* at 62-64.³ The paragraph deleted at Texas' behest had dealt with the McMillan dike and had specified that departures due to the dike were not chargeable as a result of man's activities. See Appendix C to this brief. Since the 1962 meeting, the Commission has not spoken again to the proper characterization of depletions due to the McMillan dike, and Texas has offered no further accommodations to New Mexico on this issue.

This spotlight on the 1961 and 1962 Commission meetings reveals a subtly different scene than depicted by the Special Master. In the Special Master's view, the Texas Commissioner acquiesced to a permanent legal interpretation of ambiguous Compact provisions as they applied to the McMillan dike, thereby forever binding Texas to a legal result patently at odds with reality and Article III of the Compact. Nowhere do the Commission transcripts reflect that Texas viewed its agreement as being permanent. The period then under consideration

3. With some irrelevant omissions, the *unamended* version is reproduced by the Special Master. 1986 Report 16. Attached to this brief as Appendix C is the document with the Commission's modifications highlighted. The part deleted pursuant to Texas' suggestion is in italics. The part added after the foregoing deletion is in bold-face.

ended in 1961. Future departures were not even at issue. Twice during the discussions, the Commission was put on notice that the Texas Engineering Advisor did not agree with the characterization of the McMillan dike depletions. The Commission transcripts also fail to reflect that Texas viewed its agreement as one embodying a legal interpretation. A moral obligation was acknowledged, but the use of the word "morally" implies that the law—that is, the Compact—did not provide independent authority for the characterization adopted by the Commission.⁴ Finally, the relevant Compact provisions—"man's activities" and "1947 condition"—are not ambiguous in the McMillan dike context. Both the dike and the depletions resulting from it incontrovertably are due to man's activities. The 1947 condition of the river could not encompass the McMillan dike, which was not even constructed until 1954.

The better view is that, for reasons that remain obscure, the Texas Commissioner made an accommodation with New Mexico for a specific time period—1950-1961. In plain terms, Texas made a deal with New Mexico that, regardless of the Compact, it would not treat McMillan dike depletions as man's activities for the 1950-1961 period. The accommodation did not reach past 1961. Nothing was said about the future.

In other settings, the Court has refused to bind an agency forever to a legally unsound action ostensibly taken pursuant to a federal statute, or to an erroneous interpretation of a federal statute by one of the agency's officials or employees. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Court held that a federal agency was not bound by the actions and representations of one of its officials, even when there had been detrimental reliance on the representations. *See also Schweiker v. Hansen*, 450 U.S. 785 (1981). In *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957), the Court held:

4. Now, over twenty-five years later and with the advantage of hindsight, even the moral obligation is hard to discern. At least as early as 1949, it appears that the impact of the 1941 floods on the seepage from McMillan Reservoir was well known. *See* Sen. Doc. 109, Stip. Exh 1 at 3 ("high water of 1941 opened other holes in the reservoir") and 71 (noting increasing reservoir leakage since 1940). Thus, at the time the Compact bargain was struck, the parties seem to have been aware of the seepage conditions at the McMillan Reservoir, yet made no separate provision for them in the Compact.

the doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.

353 U.S. at 183.

The general principle underlying these decisions is that the duty of lawmaking lies within the legislative realm, not the executive realm. See, e.g., *Dixon v. United States*, 381 U.S. 68, 73 (1965). Those individuals charged with enforcing laws or interpreting them for the public are not free to amend them in the course of employment through inadvertence or intention.

These principles apply here. The Compact is a federal law. *Texas v. New Mexico*, *supra*, 462 U.S. at 564. The members of the Commission it created are not empowered to amend it as they see fit. While they may be empowered to make "findings" about changes in depletions due to man's activities, see Compact, art. V(d)5, the findings are not conclusive in court, *id.*, art. V(f). The findings are supposed to be determinations of *past* depletions based upon historical data. *Id.*, art. VI(b). The power of the Commissioners to make findings does not include the power to permanently bind subsequent Commissions to agreements affecting determinations of future depletions, especially when the agreements contravene the plain language of the Compact. That would constitute an amendatory power not conferred on them by the Compact Clause of the Constitution, U.S. Const., Art. I, § 10, cl. 3.

The Commissioners did not try to make a permanently binding legal interpretation of the characterization of the McMillan dike depletions at the 1961 and 1962 annual meetings. If they had tried, they would have exceeded their legal authority under the Compact and the Compact Clause of the Constitution. They only reached an agreement and made findings for the 1950-1961 period. Thus, the Court is left with the straightforward logic and facts already discussed. See p. 9, *supra*. The McMillan dike depletions for the 1962-1983 period resulted in negative departures from the 1947 condition, and they are due to man's activities. In these circumstances, they are chargeable to New Mexico in the amount of 27,600 acre-feet.

CONCLUSION

For the foregoing reasons, the exception of the State of Texas to the 1986 Report should be sustained. In all other respects, the Court should adopt the recommendations in the 1986 Report.

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